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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 HERSON OSVALDO ROBLES-
12 ADAME,

13 Petitioner,

14 v.

15 UNITED STATES OF AMERICA,

16 Respondent.

Case No.: 3:16-cv-02850-GPC

Related Case No.: 3:15-cr-01801-GPC-1

**ORDER GRANTING PETITIONER'S
28 U.S.C. § 2255 MOTION TO
VACATE CONVICTION**

[ECF No. 1]

17
18 **I. INTRODUCTION**

19 Herson Robles-Adame ("Petitioner") filed a Motion to Vacate Conviction
20 ("Motion") under 28 U.S.C. § 2255. (Dkt. No. 31.) The United States ("Respondent")
21 filed a response, agreeing that based on the law and facts of Petitioner's Motion,
22 Petitioner's conviction should be vacated. (Dkt. No. 35 at 1.) For the reasons set forth
23 below, the Court **GRANTS** Petitioner's Motion to Vacate Conviction under 28 U.S.C. §
24 2255.

25 **II. BACKGROUND**

26 On December 14, 1994, Petitioner was born in Tijuana, Mexico. (Dkt. No. 31 at
27 17.) When he was twelve years old, he came to the United States. (*Id.*) About one year
28 after his arrival, he became a lawful permanent resident. (*Id.*) Petitioner claims that his

1 “life is in the United States, not Mexico.” (*Id.* at 19.) He attended middle school and
2 high school in San Diego County. (*Id.* at 17.) Most of his family, including his girlfriend
3 and young child, continue to reside in the United States. (*Id.* at 17–18.)

4 On July 9, 2015, Petitioner waived indictment and was charged by a criminal
5 information with bringing in aliens without presentation and aiding and abetting in
6 violation of 8 U.S.C. § 1324(a)(2)(B)(iii) and 18 U.S.C. § 2. (Dkt. No. 14.)¹ The
7 Honorable Nita L. Stormes appointed attorney Gary Edwards (“Edwards”) as counsel for
8 Petitioner. (Dkt. No. 3.) Each of the four or five times Petitioner met with Edwards,
9 Petitioner asked how a conviction for alien smuggling would affect his immigration
10 status. (Dkt. No. 31 at 18.) In response, Edwards only told Petitioner that removal was a
11 possible consequence, even though the relevant immigration statute states otherwise.
12 (*Id.*) Section 237 of the Immigration and Nationality Act (“INA”), 8 U.S.C. §
13 1227(a)(1)(E), states that “[any] alien who . . . knowingly has encouraged, induced,
14 assisted, abetted, or aided any other alien to enter or try to enter the United States in
15 violation of the law is deportable.”

16 On July 21, 2015, Petitioner pled guilty to the information before Judge Stormes.
17 (Dkt. No. 18.) The plea agreement states, “Defendant further understands that the
18 conviction in this case may subject defendant to various collateral consequences,
19 including but not limited to deportation, removal or other adverse immigration
20 consequences[.]” (*Id.* at 6). The agreement also contains an immigration consequences
21 section, which explains, “pleading guilty may have consequences with respect to his/her
22 immigration status if he/she is not a citizen of the United States.” (*Id.* at 10.) On August
23 6, 2015, the Court issued an order accepting Petitioner’s guilty plea. (Dkt. No. 21.)

24 On November 6, 2015, Petitioner was sentenced by the Court to twelve months and
25 a day in custody and two years of supervised release. (Dkt. No. 28.) During the
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28 ¹ Page numbers for docketed materials refer to those imprinted by the Court’s electronic filing system.

1 sentencing hearing, Edwards indicated that Petitioner would be removable following
2 conviction. (Dkt. No. 29 at 4.)

3 On November 18, 2016, Petitioner filed a Motion to Vacate Conviction. (Dkt. No.
4 31.) Petitioner claims that had he been properly advised, he would not have pled guilty to
5 a removable offense. (*Id.* at 18.) Alternatively, Petitioner claims that with adequate
6 counsel, he would have gone to trial and risked a longer prison term. (*Id.* at 19.)

7 On February 3, 2017, Respondent filed a Response to Petitioner's motion
8 indicating its non-opposition to Petitioner's motion. (Dkt. No. 35.)

9 **III. LEGAL STANDARD**

10 Section 2255 authorizes the Court to “vacate, set aside, or correct the sentence” of
11 a federal prisoner on “the ground that the sentence was imposed in violation of the
12 Constitution or laws of the United States, or that the court was without jurisdiction to
13 impose such sentence, or that the sentence was in excess of the maximum authorized by
14 law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255(a). To warrant relief
15 under § 2255, a prisoner must allege a constitutional or jurisdictional error, or a
16 “fundamental defect which inherently results in a complete miscarriage of justice [or] an
17 omission inconsistent with the rudimentary demands of fair procedure.” *United States v.*
18 *Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428
19 (1962)).

20 **IV. DISCUSSION**

21 Petitioner challenges his conviction under 28 U.S.C. § 2255 on grounds that his
22 counsel provided ineffective assistance by failing to adequately advise him regarding the
23 immigration consequences of his plea. (Dkt. No. 31 at 3.)

24 **A. Jurisdiction**

25 A petitioner can file a 28 U.S.C. § 2255 motion if he is a “prisoner in custody
26 under sentence of a court established by Act of Congress[.]” 28 U.S.C. § 2255(a). “[A]
27 habeas petitioner remains in the custody of the United States while on supervised
28 release.” *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005). “[Deportation] does not

1 extinguish a term of supervised release.” *United States v. Ramirez-Sanchez*, 338 F.3d
2 977, 980 (9th Cir. 2003). Here, Petitioner filed this motion after he was deported but
3 during his two-year supervised release term. (Dkt. No. 28.) Petitioner thus is a prisoner
4 in custody and can file a 28 U.S.C. § 2255 motion.

5 Further, Petitioner timely filed this motion. *See* 28 U.S.C. § 2255(f)(1) (applying
6 a one-year period of limitation from the date on which the judgment of conviction
7 becomes final). Here, the Court entered judgment on November 6, 2015. (Dkt. No. 28.)
8 Because Petitioner did not file a notice of appeal, Petitioner’s judgment became final on
9 November 20, 2015, two weeks after the Court entered judgment. Fed. R. App. P.
10 4(b)(1)(A); *see United States v. Colvin*, 204 F.3d 1221, 1222 (9th Cir. 2000) (holding that
11 “a judgment becomes final when the time has passed for appealing the district court’s
12 entry of the judgment”) Petitioner’s motion was timely filed less than a year afterward
13 on November 18, 2016. (Dkt. No. 31.)

14 **B. Ineffective Assistance of Counsel**

15 Petitioner asserts that his counsel, Gary Edwards, was ineffective because he failed
16 to inform Petitioner of the immigration consequences of pleading guilty. (Dkt. No. 31 at
17 3.) The Sixth Amendment’s effective-assistance-of-counsel guarantee requires counsel to
18 inform clients whether their pleas carry a risk of deportation. *Padilla v. Kentucky*, 559
19 U.S. 356 (2010). Petitioner’s claim is governed by the two-part test set forth in
20 *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 52
21 (1985) (holding that the *Strickland* test applies to guilty plea challenges based on
22 ineffective assistance of counsel). In order to establish an ineffective assistance claim,
23 Petitioner must prove that (1) his attorney’s representation fell below an objective
24 standard of reasonableness and (2) any deficiencies in counsel’s performance prejudiced
25 the defense. *Strickland*, 466 U.S. at 687, 692.

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1 **i. Whether the Attorney’s Representation Fell Below an Objective Standard**
2 **of Reasonableness**

3 “The proper measure of attorney performance remains simply reasonableness
4 under prevailing professional norms.” *Strickland*, 466 U.S. at 688. “A court must
5 indulge a strong presumption that counsel’s conduct falls within the wide range of
6 reasonable professional assistance.” *Id.* at 689. At the same time, it is the Court’s
7 “responsibility under the Constitution to ensure that no criminal defendant—whether a
8 citizen or not—is left to the ‘mercies of incompetent counsel.’” *Padilla v. Kentucky*, 559
9 U.S. 356, 374 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

10 “The weight of prevailing professional norms supports the view that counsel must
11 advise her client regarding the risk of deportation.” *Id.* at 367. Given that immigration
12 law can be complex, an attorney need only advise a noncitizen client that “pending
13 criminal charges may carry a risk of adverse immigration consequences” when “the law
14 is not succinct and straightforward.” *Id.* at 369. However, “[where] the immigration
15 statute or controlling case law expressly identifies the crime of conviction as a ground for
16 removal,” an attorney’s “duty to give correct advice is equally clear.” *Id.*; *U.S. v.*
17 *Rodriguez-Vega*, 797 F.3d 781, 786 (2015). “A criminal defendant who faces almost
18 certain deportation is entitled to know more than that it is possible that a guilty plea
19 would lead to removal; he is entitled to know that it is a virtual certainty.” *U.S. v.*
20 *Bonilla*, 637 F.3d 980, 984 (2011).

21 Moreover, an attorney has a duty to accurately advise his client of the immigration
22 consequences before he enters into a plea. *Rodriguez-Vega*, 797 F.3d at 787. A criminal
23 defendant who is armed with the knowledge of the consequences at the proper time could
24 instruct his counsel to attempt to negotiate a plea that would not result in his removal. *Id.*

25 Applying the first prong of the *Strickland* test, the Court finds that counsel’s
26 performance fell below an objective standard of reasonableness. Here, Petitioner claims
27 that over the four or five times he met with his attorney, Edwards only told Petitioner that
28 removal was a possible consequence from pleading guilty, not a virtual certainty. (Dkt.

No. 31 at 18.) However, the immigration statute at hand, Section 237 of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(E), plainly states that “[any] alien who . . . knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of the law is deportable.” Given that the immigration statute expressly identifies the crime of conviction as a ground for removal, Edwards had a duty to advise Petitioner that his removal was a virtual certainty. *Rodriguez-Vega*, 797 F.3d at 786.

It is immaterial that Edwards indicated during the sentencing hearing that Petitioner would be removed. (Dkt. No. 29 at 4.) Edwards had a duty to accurately advise Petitioner of the removal consequences *before* he pleaded guilty. *Id.* at 787. For the same reason, it is immaterial that the plea agreement states that a guilty plea “may have consequences with respect to his/her immigration status if he/she is not a citizen of the United States.” *Id.*; (Dkt. No. 18 at 10.) This agreement also fails to state in unambiguous terms that a guilty plea renders Petitioner’s deportation a virtual certainty. Furthermore, “[the] government’s performance in including provisions in the plea agreement . . . are simply irrelevant to the question whether counsel’s performance fell below an objective standard of reasonableness.” *Rodriguez-Vega*, 797 F.3d at 787.

ii. Whether Petitioner Suffered Prejudice from Deficient Representation

A petitioner demonstrates that he suffered prejudice from deficient representation if he shows that “a reasonable probability” exists “that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* In order to satisfy this claim, “a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, 559 U.S. at 372. In other words, the petitioner must allege that “but for counsel’s errors, he would either have gone to trial or received a better plea bargain.” *U.S. v. Howard*, 381 F.3d 873, 882 (2004).

1 Applying the second prong of the *Strickland* test, the Court finds that Petitioner has
2 suffered prejudice as a result of counsel's failure to inform Petitioner of the deportation
3 consequences. Here, Petitioner states that he would not have accepted the plea had he
4 known that he would be removed. (Dkt. No. 31 at 18.) Like the petitioner in *Rodriguez-*
5 *Vega*, Petitioner points to four recent cases from the Southern District of California in
6 which the defendants were charged with the same crime as Petitioner but pled guilty to a
7 non-removable offense. *See* 797 F.3d at 788; (Dkt. No. 31 at 12.) These cases
8 demonstrate that but for counsel's deficient performance, Petitioner could have
9 negotiated a different plea agreement not requiring his removal.

10 Additionally, the Court finds that Petitioner has demonstrated prejudice by
11 showing a reasonable probability that even in the absence of a more favorable plea
12 agreement, he would have gone to trial. Petitioner claims that had he been properly
13 advised, he would have gone to trial and risked a longer prison term. (Dkt. No. 31 at 19.)
14 Instead, when he was only twenty years old, he pled guilty to an offense rendering his
15 removal virtually certain. (*Id.* at 17; Dkt. No. 18.) Petitioner states that his "life is in the
16 United States, not Mexico." (Dkt. No. 31 at 19.) Most of his family, including his
17 girlfriend and young child, reside in the United States. (*Id.* at 18.) Petitioner also
18 attended middle school and high school in the United States. (*Id.* at 17.) These personal
19 ties to the United States suggest that Petitioner had much to lose from removal and more
20 incentive to reasonably risk going to trial. "A young lawful permanent resident may
21 rationally risk a far greater sentence for an opportunity to avoid lifetime separation from
22 her family and the country in which they reside." *Rodriguez-Vega*, 797 F.3d at 789.

23 Further, courts have "found prejudice where a non-citizen demonstrates clearly that
24 she placed a 'particular emphasis' on the immigration consequence of a plea in deciding
25 whether or not to accept it." *Id.* (quoting *United States v. Kwan*, 407 F.3d 1005, 1017–18
26 (9th Cir. 2005)). Petitioner raised his immigration status with his attorney each of the
27 four or five times they met. (Dkt. No. 31 at 18.) This indicates that his immigration
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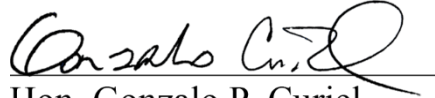
1 status was paramount to his decision to accept the plea agreement, and that he would
2 have reasonably risked going to trial to avoid removal.

3 **V. CONCLUSION AND ORDER**

4 For the foregoing reasons, the Court **GRANTS** Petitioner's Motion to Vacate
5 Conviction under 28 U.S.C. § 2255. The Clerk of Court shall close the case.

6 **IT IS SO ORDERED.**

7 Dated: June 7, 2017

8 
9 Hon. Gonzalo P. Curiel
United States District Judge